

In the Supreme Court of the Hawaiian Islands.

In Equity.

HEARING MARCH 27TH, 1893.

THE HAWAIIAN COMMERCIAL AND SUGAR COMPANY VS. THE WAIKAPU SUGAR COMPANY.

REPORT JUDG. C. J. RICKERTON, J., AND WRITING, CIRCUIT JUDGE.

(Mr. Justice Frear having been of counsel did not sit in this case, and, by request, Writing, Circuit Judge, sat in his stead.)

Where one of two tenants in common entered into occupation of not more than his proportion of the land owned in common and cultivated the same, the other tenant also occupying the rest of the land, he is not liable to account to the other tenant for the profits made therefrom from his own labor and capital, unless there has been an ouster or what is equivalent.

Two tenants in common of moieties occupied separate portions of the common property, not denying each other's title, nor asking to be let into the portion of the land occupied by the other; one tenant asked the other for a settlement of the matter, but did not desire partition. Held, not sufficient to constitute ouster.

OPINION OF THE COURT BY JUDG. C. J.

This is a bill for partition of land and for an account. Both parties agree that partition may be made, and the main question before us is whether an account of issues and profits shall be ordered. The bill is defended, by leave of the Court, by George W. Macfarlane, a shareholder in and owning one-half of the stock of the defendant corporation, the other half of the stock being held by Claus Spreckels, as trustee for the plaintiff corporation. Leave was given to Mr. Macfarlane to defend the suit as a shareholder, because it was impossible to procure corporate action in the defendant's corporation, the stock being held in equal proportions by Mr. Macfarlane and Mr. Spreckels, and the by-laws requiring the assent of three-fourths of the stock for corporate action, there being no directors.

We find the substantial facts of the case to be as follows: The plaintiff corporation owns in fee simple one undivided half of the land in question, which consists of a portion of the Ahupua'a of Waikapu and of Pulehouni, known together as the "Waikapu Commons," situated on the island of Maui. The area of the entire tract is about 15,000 acres. It consists mainly of the land on the isthmus between East and West Maui and has a chain of sand hills running through and dividing it. The land was formerly owned by one Henry Cornwell, who conveyed one undivided half thereof to Claus Spreckels on the 20th June, 1878, and Claus Spreckels conveyed the same interest to the plaintiff corporation on the 27th February, 1885.

Henry Cornwell conveyed fifteen-sixteenths of one-half of this land to George W. Macfarlane and Wm. H. Cornwell on the 1st March, 1877, and on the 9th June, 1879, he conveyed to the same parties the remaining one-sixteenth.

On the 4th December, 1883, G. W. Macfarlane and Wm. H. Cornwell conveyed their one undivided half of this land, thus acquired, to the defendant corporation, which had been incorporated on the 13th July of the same year. Until the year 1889 the shares of the defendant corporation were owned one half by Wm. H. Cornwell and the other half by Geo. W. Macfarlane, except eighteen shares held by R. R. Hind, and which became the property of Mr. Macfarlane in March, 1889, who has since held them. Claus Spreckels bought in March, 1889, the shares of Wm. H. Cornwell and holds them for the plaintiff corporation; and at the date of the bill the stock of the defendant corporation was owned as above stated, one half by Mr. Macfarlane and one half by the plaintiff corporation.

The property in question, held as tenants in common by the plaintiff and defendant corporations in moieties, contains, as stated, about 15,000 acres of land, and it lies between the land and sugar works of these respective corporations, there being about 5,000 acres capable of growing sugar cane, irrigated, on the side of the intersecting sand hills next to and adjoining the property and works of the plaintiff corporation and about 2,000 acres of similar character on the side of the sand hills adjoining the Waikapu plantation (defendant corporation). No part of this land has water upon it or water rights with which sugar cane could be cultivated. As to the relative quality and value of the land on each side of the sand hills the testimony is conflicting, and it is not essential here to consider which part is the more valuable. When Mr. Spreckels purchased from Henry Cornwell he made a written agreement by which Mr. Cornwell was allowed to graze his cattle on the common property and on the Ahupua'a of Waikapu owned by Mr. Spreckels, for three and a half years free of charge; and on the 29th August, 1881, Mr. Spreckels and Mr. H. Cornwell signed an agreement to divide and partition the lands owned by them in common on Maui and more especially the tract of land one undivided half of which was sold by Cornwell to Spreckels (the Waikapu Commons). But as Mr. H. Cornwell

had, four years previous to this, sold his interest in this land to Messrs. G. W. Macfarlane and W. H. Cornwell, the agreement to divide was without binding effect upon the moiety now held by the defendant corporation. The plaintiff, the Hawaiian Commercial and Sugar Company, a foreign corporation, had begun operations as a sugar plantation in this country previous to 1882, but the title to its property was, including the interest in the Waikapu Commons, in Claus Spreckels until 1885 when it was transferred to the corporation. Mr. Spreckels had in 1882 a controlling interest in the corporation, which continued to the date of this suit. In April or May, 1882, the employees of the Hawaiian Commercial and Sugar Company began to fence in and cultivate in sugar cane some land on the Waikapu Commons contiguous to its other cane fields in the land of Waikapu, and whether the title to one half of the Waikapu Commons was then in Spreckels or his corporation is unessential, as it seems to us, since the corporation has adopted his acts in this respect and reaped the benefit of them and would not be allowed to plead want of title in it at the time of the occupation. Year by year the corporation took in more land, plowing it up, fencing and planting it field by field, until it had brought under cultivation in sugar cane, though not all at any one time, some forty-five hundred or five thousand acres of the common property. Upon this it brought water to irrigate the cane, bought from the Waikae Sugar Company and led from the Waikae river, and water from its own ditch leading from the district of Hamakua, and transported the cane when harvested to its own mills by means of railways. The plaintiff corporation fenced and maintained in fence the land which it cultivated. All that part of the Waikapu Commons on the Waikapu side of the sand hills and whatever was not under fence by the plaintiff corporation, being uninclosed, was used for grazing by the defendant corporation for its own and other persons' cattle, and this company also enclosed and cultivated in sugar cane for a short time three parcels of land on the Waikapu side of the sand hills amounting to 107 acres and also enclosed, and has ever since used as a grazing paddock some 150 acres of land situated near Maialaea Bay. The defendant corporation has received some considerable sums of money for pasturing animals on the unenclosed portions of the common estate, keeping an account thereof.

All this common produces a good growth of grass from winter rains which dries up in summer, but it is impossible to produce crops of sugar cane upon it without the use of water for its irrigation. W. H. Cornwell was manager of the Waikapu plantation in 1876, and has continued to be such manager up to the date of this suit, covering a period previous to and ever since its incorporation. In 1882, when the plaintiff began to plow, fence and cultivate across the line and in the common property, it was noticed by Mr. Cornwell, the manager of the Waikapu plantation, who notified his partner, Mr. Macfarlane, of the fact. Mr. Macfarlane then applied to Mr. Spreckels for a "division" or "settlement," and he and Mr. Spreckels agreed to meet upon the land with a surveyor and ascertain if it could be divided. The parties met in July, 1882, went over a portion of the land together, but came to no agreement. Mr. Spreckels not expressly declining to divide, but dismissing the subject when approached by Mr. Macfarlane, saying "it was not an easy matter to divide the land."

Both parties to this suit say that they never at any time denied the title of the other in this land. Both Mr. Cornwell and Mr. Macfarlane testify that they never, at any time, asked to be allowed to use any portion of the common estate included within the fence of the plaintiff corporation and cultivated by it, and also that the defendant corporation's occupation of such portion of the land as it did occupy was never expressly interfered with or objected to by Mr. Spreckels or the plaintiff corporation.

There is no dispute as to the fact that each party, plaintiff and defendant, has used and occupied separate portions of the common estate from 1882 to the date of this suit, and each has used that portion of the land contiguous to the rest of its property. Thus far the facts of this case as outlined above are not disputed. We come now to the question of law whether to entitle a tenant in common to an account from his co-tenant an ouster, or what is equivalent, is essential to be proved as is contended by plaintiff or whether the tenant in possession is liable to be made to account to his co-tenant, even though no ouster be shown. But before entering upon this discussion it must be remembered that this is not the case of one tenant in common occupying the whole of the estate, for the occupation of the plaintiff though differing in character from the occupation of the defendant was of not more than one-half of the area of the common estate. Nor is this a case where one tenant has rented out the land to third parties taking all the rents to his own use. But in the case before us the Hawaiian Commercial and Sugar Company has used its own capital and labor in cultivating sugar cane, having brought water upon the land, upon not more than one-half of the acreage of the common estate, and the Waikapu Sugar Company has been in possession and got what it could out of the remaining part.

An ouster is the wrongful dispossession or exclusion from real property of a party who is entitled to the possession. As between tenants in common where all are entitled to the possession, the intent with which possession is taken is material, for a stranger having no title may enter land and exercise acts of ownership over it and leave little room to doubt that he thereby intends to oust the true owner. But a co-tenant may enter the whole or any part of the common estate as he has legal right to do, and the presumption of law is, when nothing more is done, that he intends to do nothing beyond the assertion of his right. There must be stronger evidence to prove that one tenant has ousted another, than to prove that a person having no right to the possession has ousted the owner. The proof of ouster between tenants in common ought to be of the most satisfactory nature. The law will deem the possession amicable until the tenant out of possession has in some method been notified that it has become hostile. Freeman, Co-T. & Par., Sec. 221. In Vermont it is said that the acts relied upon to prove ouster between tenants in common must be such as would constitute ouster between landlord and tenant. Buckmaster vs. Needham, 22 Vt., 623.

In New York it is held that to establish an adverse possession by one tenant in common such as will effect the ouster of his co-tenant, notice in fact of the adverse claim is required, or unequivocal acts, open and public, making the possession so visible, hostile, exclusive and notorious that notice may be fairly presumed. Culver vs. Rhodes, 87 N. Y., 348. Undoubtedly exclusive possession of a part of the common property may be taken with the intent to oust his co-tenant of it. Carpenter vs. Webster, 27 Cal., 525. In this California case there had been a refusal by the tenant in possession to let the out-tenant in and occupy the sixty acres cultivated by the tenant in possession, which was only a small part of the whole estate. The case of Bennett vs. Clemence, 6 Allen, 18, is not in point, for there the tenant in possession had erected a permanent structure which appropriated exclusively the entire land, and this was held to be evidence of ouster. "Nothing is better settled than the rule that the mere occupation of premises owned in common, by one of the tenants in common, does not entitle his co-tenant to call him to account, or render him in any way liable to an action for the use and occupation of the estate. Each owns the estate *per se* et *pro parte*. If a co-tenant does not see fit to come in and occupy, the other still has the right to the enjoyment of the estate, and in such case the sole occupation of one is not an exclusion of the other. Each tenant, being seized of each and every part and parcel of the estate, has a right to the use and enjoyment of it, and so long as he does not hold his co-tenant out, or in any way deprive him of the occupation of the estate, he exercises only a legal right, and receives nothing for which he is bound to account to his co-tenant." Badger vs. Holmes, 6 Gray, 118.

By the common law there was no remedy by one tenant in common against the other taking the entire profits and by the Statute of Anne (4 and 5 Anne, Chap. 16, Sec. 27) an action of account might be maintained by one tenant in common against the other charging him, as bailiff, for receiving more than his share or proportion and it was necessary to show an actual receipt of rents and profits over and above his share thereof. The English courts restrict the co-tenant's liability for accounting to money received from third parties and a majority of the States of the American Union adopt the same rule. We understand that the opposite view obtains in Georgia, Virginia, Ohio, Rhode Island and possibly in Vermont and New Jersey, where a tenant in possession is held accountable for profits made by his own labor out of the common estate more than his proportion in accordance with his title. See Lard vs. Bodine (N. J.) reported in 69 Am. Dec. 536; Early vs. Friend, 16 Grat. 21 (Va.) reported in 78 Am. Dec. 649; West vs. Meyer, 46 Ohio, 71; Hayden vs. Merrill, 44 Vt., 336.

The view of the majority is thus expressed by Freeman in Co-T. & Par. Sec. 225: "But the decided preponderance of the authorities both in England and America, affirms the right of each co-tenant to enter upon and hold exclusive possession of the common property, and to make such profit as he can by proper cultivation or by other usual means of acquiring benefit therefrom, and to retain the whole of such profits, he has not been guilty of an ouster of his co-tenant, nor hindered the latter from entering upon the premises and enjoying them, as he had a right to do. The reasoning upon which these decisions, constituting the great bulk of the authorities on this subject, rests is: That as each co-tenant has, at all times, the right to enter upon and enjoy every part of the common estate, this right cannot be impaired by the fact that another of the co-tenants asserts himself or does not choose to claim his right to an equal and common enjoyment; that it would be inequitable to compel a co-tenant in possession to account for the profits realized out of his skill, labor and business enterprise when he has no right to call upon his co-tenant to contribute anything towards the production of these profits, nor to bear his proportion, when through bad years, failure of crops, or other unavoidable misfortune the use made of the estate resulted in a loss instead of a profit to

the one in possession." The following cases sustain this view:

Peck vs. Carpenter, 7 Gray, 283.  
Crane vs. Waggoner, 27 Ind., 62.  
Shepherd vs. Richards, 2 Gray, 424.

Woolver et al. vs. Knapp, 18 Barb., 265.

Pico vs. Colimbat, 12 Cal., 414.  
Cook vs. Webb, 21 Minn., 428.  
Kean vs. Connelly, 25 Minn., 222.  
Hause vs. Hause, 29 Minn., 252.  
Everts vs. Beach, 31 Mich., 135.  
Campan vs. Campan, 44 Mich., 31.  
Reynolds vs. Wilmet, 45 Iowa, 633.  
Sears vs. Sewell, 28 Iowa, 505.  
Blood vs. Blood, 110 Mass., 547.  
Osborn vs. Osborn, 62 Tex., 495.  
Creed vs. People, 81 Ill., 565.

The following cases in our own Court show that an ouster is essential in the instances given:

Naknaiman vs. Halstead, 4 Haw., 42.

Kaia vs. Kamaile, 4 Haw., 352.

We hold upon authority that to charge a tenant in common with what profits he may make while in possession of the common estate or a part thereof an ouster of his co-tenant or what is equivalent must be shown. Mere occupation is not sufficient. Occupation is not necessarily exclusion. Upon principle also we consider this to be the best view. If the mere fact of occupation by a tenant in occupation, who wishes by his industry to obtain some profit from land in which he has an interest, would render him liable to a tenant who does nothing but lie by and see the land tilled and improved, it would be a serious discouragement to agriculture and business enterprise, and such lands would be very apt to lie idle. No one could safely occupy and use such lands. Partition would have to be resorted to in every case of such joint ownership.

We come now to the question whether the facts of this case show an ouster by the plaintiff of the defendant. We have seen that the actual occupation of the Waikapu Commons was of separate portions by each of the tenants in common. Both Mr. Macfarlane, the stockholder, and Mr. W. H. Cornwell, the manager of the Waikapu Sugar Company, knew of the occupation by plaintiff from time to time as the land of the common estate was occupied by plaintiff for sugar culture. Both these gentlemen say that they never at any time nor in any manner consented or agreed that Mr. Spreckels or the Hawaiian Commercial and Sugar Company should fence in and take exclusive possession of any part of the Waikapu Commons. And yet, while fully aware of this occupation, neither of them ever objected to it or protested against this action, nor denied the plaintiff's title to it, nor asked to be let into possession and make use of the part so occupied. In fact the Waikapu Sugar Company, it was admitted, with its limited water supply could not have used the land for cane culture. We remark here that all the facts of the case certainly for a long period of time, are consistent with an agreement for separate occupation, although we do not consider such an agreement to be sufficiently and clearly proved. The separate occupation was amicable. The plaintiff corporation kept its cane fields fenced, and if defendant's cattle broke into them they were returned to defendant without charge for damage. A simple arresting and impounding of these animals for trespass by the plaintiff's company would have been sufficient to show an ouster, and the breaking of the fences by defendant's company and letting their animals into the cane fields of plaintiff would show that they objected to this use of the land and claimed it. None of these things were done. All we have in evidence are the mild efforts of Mr. Macfarlane to procure a "settlement" of the matter from Mr. Spreckels. It has been difficult for us to ascertain what this request for a "settlement" meant. Mr. Macfarlane explains it by saying that he meant compensation for the use and occupation of the land by Mr. Spreckels' company. And he distinctly says that he never really desired a partition of the estate. A request for a settlement could hardly be considered a claim for ouster in the face of the avowal by Macfarlane that he did not desire partition. But, as we have seen, he would not be entitled to such compensation under our view of the law, unless he had demanded that his company be let into the use of that part of the estate thus occupied and been refused, or was able to show facts from which an ouster could be found. He says he made no such formal request, excusing himself for the reason that his other business relations would suffer. He was a debtor to Mr. Spreckels or his sons in a very large amount, and a hostile attitude in the matter of the Waikapu Commons would have made, in his opinion, a rupture of those relations; payment of his debts would be exacted, and this would entail loss, and perhaps ruin, to himself and his patrons. While regretting this unfortunate position, all we can say is that the Court cannot vary the law to suit his circumstances, and whatever be the reason for making no explicit demand for possession—a refusal to comply being an ouster—we do not find any such proof. Mr. Macfarlane weighed all his business interests, and if some outweighed those under consideration and prevented his taking the stand which the law required of him in order to enable him to have the redress he now seeks, it cannot now be helped. Hostile proceedings between these corporations did not begin until June, 1891; Mr. Macfarlane says that in 1886 or 1887 he had become freed from all his pecuniary obligations to Mr. C. Spreckels or the Spreckels brothers.

Certainly there was nothing to prevent his making a demand for possession of the land occupied by plaintiff's corporation during this interval.

We therefore hold that no ouster has been shown in this case and the appeal is dismissed. The decree of the Chief Justice, which orders partition of the estate, but without an account from either party to the other, is affirmed.

F. M. Hatch for plaintiff; A. S. Hartwell, C. L. Carter, Thurston & Frear for defendant.  
Honolulu, Sept. 19th, 1893.

In the Supreme Court of the Hawaiian Islands.

HEARING JUNE 13TH, 1893.

P. G. CAMARINOS VS. JOHN KIDWELL.

BEFORE JUDG. C. J. RICKERTON, J., AND COOPER, CIRCUIT JUDGE.

(Mr. Justice Frear being disqualified, having been of counsel, on request, Circuit Judge Cooper sat in his stead.)

Under a contract for sale of "pineapples in good condition to weigh three pounds and upwards," defendant (the seller), weighed in the crown or top with the edible part. The Court charged the jury that "under the contract the defendant was obliged to deliver the plaintiff pineapples which include the fruit with the crown, and defendant had no more right to mutilate the crown than the fruit itself." Held, no error, since the defendant is held to have admitted by weighing the crown with the fruit that the crown was a part of the "pineapple" sold, and it was left to the jury to find whether the crown was mutilated by defendant so that it deteriorated or spoiled the fruit part.

Evidence commented on, showing that the jury had data before them upon which to find a verdict for actual damage suffered by plaintiff and for loss of probable profits.

In an action by buyer against seller, if the seller fails to deliver the goods, the buyer may recover the difference between the contract price and the market value at the time and place of delivery.

OPINION OF THE COURT BY JUDG. C. J.

This is an action for damages for breach of a contract made by the parties on the 10th of April, 1890, wherein Kidwell agreed to sell to Camarinos for the term of thirty months from the 1st July, 1890, all the fine quality pineapples, viz., Sugar Loaves, Queens and Smooth Cayennes grown for sale by Kidwell, the pineapples to weigh three pounds and upwards and to be delivered at the store of Camarinos, in Honolulu, in good condition—Camarinos was to pay 35 cents for every such pineapple delivered in accordance with the above conditions. At the first trial in the Supreme Court at the January term, 1892, the jury disagreed and were discharged. At the April term, 1892, the case was retried and the jury (two dissenting) found a verdict for the plaintiff Camarinos, \$512.75 special damages and \$750.00 for probable profits.

Two bills of exceptions have been allowed defendant. The first is to the ruling of the trial, Justice allowing an instruction to the jury asked for by the plaintiff. The second is to the Justice's refusing to grant a new trial on the ground that the verdict was contrary to law and the evidence. There had been, previous to the contract in question, dealings between these parties respecting pineapples of which Mr. Kidwell was an extensive cultivator and Mr. Camarinos having a fruit store selling pineapples in Honolulu and also shipping them for sale to San Francisco.

Up to June, 1891, that is for a period of about eleven months, Kidwell delivered pineapples to Camarinos in good condition as to weight and ripeness which he either sold here or shipped to California. The evidence for the plaintiff is to the effect that most of the pineapples delivered had been either poisoned by the insertion of a corrosive substance or acid which destroyed the growing ability of the "top" or "crown" or tuft of leaves on the summit of the pineapple, or that a sharp instrument had been thrust down into the middle of the crown, either of which caused the fruit to decay and spoil. Plaintiff claimed that the shipments to California showed a loss from decay of the pineapples which damaged him as found by the jury in the sum of \$512.75.

The defendant denied using any corrosive substance or acid on the fruit, but admitted that he inserted a chisel in the crown of the fruit which removed its centre or growing point, while still growing, which he claimed tended to increase the size of the fruit and did no damage to the edible part. It was left to the jury to say whether the acts of the defendant caused the fruit to decay and damage the plaintiff. Plaintiff refused, June 9th, 1891, to receive any more pineapples mutilated as alleged by the defendant, and no more were tendered thereafter by defendant. The plaintiff asked the following instruction, which was given:

"The jury is instructed that under the contract the defendant was obliged to deliver the plaintiff pineapples which include the fruit with the crown, and defendant had no more right to mutilate the crown than the fruit itself."

It would seem at first reading of this instruction that the Court had

taken from the jury the question whether a "pineapple" as a matter of fact was composed of the "crown" and the edible part together. If this was all that the Court said it would be erroneous, for the jury were the judges of the question as to what constituted a pineapple. But in the Court's charge it based this instruction that a pineapple included the crown with the fruit part, upon the admission of the defendant that in order to make up the contract weight of three pounds and over to each pineapple, he included the top with the edible part, and the Court said it was not an open question of fact to pass upon, because Mr. Kidwell had admitted that the crown was a part of what he had sold and what Mr. Camarinos had bought. And in regard to the cutting of the tops the Court left it to the jury to find on the evidence "whether the defendant cut the tops when they were half grown, with the idea of stopping the growth of the top and forcing the growth to enlarge and improve the fruit, and that such cuts would heal up (defendant showing fruit which had been treated in this way which had healed up), and if they found that it did not injure the fruit so that it was in 'good condition,' then defendant had done no damage to plaintiff—if plaintiff received his fruit in good condition and had the full advantage of the market price of the whole thing, the top and the pine itself." And the jury were also instructed that if on the preponderance of the evidence they found that the fruit delivered by defendant was deteriorated or spoiled through the acts of the defendant, they must find for the plaintiff. In short, the jury were told that the crown was a part of the pineapple because defendant had so considered it, and that if defendant mutilated it so that it deteriorated or spoiled the fruit they might find for plaintiff. And we cannot see that the jury were misdirected by the instruction given, when the whole charge is considered.

It is contended on behalf of the defendant that the evidence does not sustain the verdict in that the shipments for six months did not show a total loss—especially, because if they had resulted in total loss the shipments would not have been continued for this period. All we say is that these facts were all left to the jury, and the explanation of Camarinos why he did not object sooner to the condition of the fruit was left to the jury.

It is claimed also that the jury found for the San Francisco price of the pineapples upon which there had been a total loss, whereas the law is and the jury were so instructed, that the measure of damages was the difference between the contract price and the market price at Honolulu or San Francisco. In the case of the pineapples that were actually delivered, paid for and shipped by plaintiff to San Francisco, the damages were the price for which they would sell in San Francisco, that is the contract price which had been paid and the profit thereon. In that part of the case relating to the damage the plaintiff suffered by loss of profits to be made upon the pineapples during the remainder of the thirty months, that is, from June 9th, 1891, to 31st December, 1892, the rule was correctly laid down—that plaintiff's loss, if the contract was rescinded by defendant's wrongful acts, was the difference between the contract price (he not having paid it) and the selling price in San Francisco. "In an action by buyer against seller, if the seller fails to deliver the goods, the buyer may recover the difference between the contract price and the market value of them at the time and place of delivery." 5 Am. & Eng. Encyclo. of Law, p. 30; 2 Benj. Sales, Sec. 1335. Only a limited number of the choice varieties of pineapples could be sold here; it was contemplated that the majority of them were to be shipped, and they were picked by Mr. Kidwell at the proper stage of maturity with this in view. The jury had data before it of the number of pineapples likely to be ready for delivery during that period and the average price for which they would sell in San Francisco. This evidence varied widely on the opposing sides, but it was before the jury with a proper instruction, and we cannot see that the verdict is not sustained by the evidence. The estimate of his anticipated profits, as made by the plaintiff was far in excess of the verdict. The jury undoubtedly considered the perishable nature of the fruit and its liability to loss and the uncertainty of its market according as it was stocked or not with other fruit. There was no contract of resale by Camarinos shown. He says he consigned the fruit to his brother in San Francisco, who sent him California fruit in exchange, and that once a year they settled accounts. The account sales shown by defendant of pineapples shipped by him during the period in question showing much less profit is not conclusive for the reason that the ordinary or Hawaiian pineapples were included in the consignments with the best qualities, the subject of this contract and the prices realized from each are not separated. The evidence in this case was voluminous; the trial occupied three days and it was exhaustively tried, and we find no reversible errors disclosed.

Exceptions overruled.  
P. Neumann and C. Creighton for plaintiff; F. M. Hatch, Thurston & Frear for defendant.  
Honolulu, September 14th, 1893.

The tenth census shows that 23,010,000 inhabitants of the United States are supported by agriculture, 11,520,000 by manufactures, and 15,620,000 by commerce.